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ALEXANDER L. STEVAS,

No. 83-425

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE I. GIAMMETTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIA F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Petitioners,

-against-

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the District Court properly dismissed, and the Court of Appeals properly affirmed the dismissal of the complaint for failure to state a claim upon which relief can be granted where the complaint challenges the administrative determination concerning the number of firefighters assigned to some New York City firetrucks as violative of the Equal Protection and Due Process Clauses of the United States Constitution.

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RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The respondent New York City Fire Department (Fire Department), pursuant to McKinney's New York General City Law §20(12) and

New York City Charter §487, provides firefighting and fire prevention services throughout New York City. The basic unit within the Fire Department providing these services is a fire company. Fire companies are comprised of either an engine company, which carries hoses and pumping equipment, or of a ladder company, which carries hooks and ladders. There are two hundred ten engine companies in the New York City Fire Department (20a).*

Prior to 1971, a large number of engine companies were staffed by four firefighters (21a). In 1971, staffing was increased and each engine company was assigned five or more firefighters per tour of duty (21a).

In 1975, however, due to budgetary deficits experienced as a result of the fiscal crisis, the number of firefighters per tour was reduced to four

*Unless otherwise indicated, numbers in parentheses followed by the letter "a" are references to pages in the Appendix to the Petition.

in all but forty-two engine companies (21a). In addition, fifty-one firefighting units were closed.

Between July, 1977 and May, 1979, the fiscal situation improved. Accordingly, staffing was increased to present levels - the levels which are being challenged in this lawsuit. The relevant allocation of Fire Department personnel is as follows: 139 engine companies are staffed with five firefighters per tour of duty while seventy-one engine companies have four firefighters assigned to each tour of duty (22a).

In March, 1982, petitioners commenced this civil rights action, seeking declaratory and injunctive relief. Petitioners allege that the above-stated levels of staffing are inadequate and thus they are deprived of sufficient fire protection (10a-36a). Petitioners further allege that this deprivation constitutes a violation of the Equal Protection Clause and the Due Process Clause of the United States Constitution. Furthermore, petitioners allege that they are entitled to an order directing respondents to increase the number of firefighters

from four to five, in those seventy-one engine companies which are allegedly "undermanned".

In May, 1982, respondents moved pursuant to the Federal Rules of Civil Procedure (FRCP) Rule 12(b)(6), to dismiss the complaint. Respondents sought dismissal on the ground that the issue of staffing levels of New York City firetrucks is one within the judgment of the municipality to determine how best to allocate limited resources. Respondents argued that under no set of facts could the question of staffing rise to the level of a constitutional deprivation (45a-48a).

The United States District Court for the Southern District of New York (GRIESA, J.) granted the respondents' motion to dismiss (7a). The court held that petitioners' complaint "borders on the frivolous" (6a). Further, the District Court held:

> The question of the level of fire protection in New York City is a matter to be decided by the City government and ultimately by the political process. The complaint itself alleges that, over the years, staffing has varied from time to time, and from company to

company. There is no allegation of anything which could make the matter of a staffing level of 4 firemen amount to a federal constitutional question on any theory (6a).

The Second Circuit Court of Appeals affirmed the judgment dismissing the complaint (1a-4a). With respect to petitioner's claim that the manning of engine companies in their fire districts with four and not five firefighters denied them equal protection of the laws, the Court of Appeals held that there is a "rational basis for the City's decision," (3a) which petitioners themselves "acknowledge in their pleadings" (2a). Thus, the Second Circuit found petitioner's equal protection argument to be without merit.

The Court of Appeals found petitioner's "due process claims are no more credible" (3a). The court stated petitioners' contention that New York City's laws create an entitlement to fire protection "is to mistake a power for a duty. To contend that this fancied general duty, even if it existed, creates the specific constitutional requirement of an additional

firefighter in four-person companies is to mistake the Constitution for a wish list" (3a). Moreover, the Court found specific authority for New York City to decrease the size of its firefighting forces in the New York City Administrative Code §1173-4.3(b) which "empowers the City 'to relieve its employees from duty because of lack of work or for other legitimate reasons....' " (3a). Accordingly, the Second Circuit Court of Appeals affirmed the judgment dismissing the complaint.

REASONS FOR DENYING THE WRIT

PETITIONERS HAVE FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IN THIS MATTER.

Petitioners do not seek review by this Court to resolve a conflict between the decisions of the District Court and Court of Appeals herein, and those of other state or federal courts. Rather, their sole basis for seeking review is an "alleged departure from the usual course of judicial proceedings" when the District Court dismissed and

the Court of Appeals affirmed dismissal of their complaint. It is respectfully submitted that the courts below did not depart from the usual course of judicial proceedings in dismissing the complaint since petitioners can prove no set of facts in support of their claim which would entitle them to relief; moreover, even if the dismissal was procedurally improper, it is not a matter which warrants review by this Court.

A. PETITIONERS' COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

1. There is a rational basis for the determination concerning how many firefighters man a firetruck.

While conceding that neither a suspect classification nor a fundamental right is involved in this matter, petitioners argue, nonetheless, that they have been denied equal protection of the laws. To so argue, they must be able to prove that there is no possible rational basis for the New York City determination to staff some firetrucks with four firefighters while others are staffed with five

firefighters. Kelley v. Johnson, 425 US 238, 247 (1975); Lindsley v. National Carbonic Gas Co., 220 US 61, 78 (1911). However, on the face of their own complaint petitioners have stated that the reductions in staffing from five to four firefighters in 1975 was due "solely to the budgetary deficits experienced by the City...." (21a). Thus, petitioners' equal protection claim is without basis.

However, petitioners now argue for the first time that while the fiscal situation may have been the original rational basis for the decision to cutdown on staffing, it no longer qualifies as a rational basis for the continued "undermanning". The Mayoral statement upon which petitioners rely for that argument belies such an assertion.*

*Respondents did not and do not rely upon the Mayoral Statement to support their argument that the complaint should be dismissed pursuant to FRCP 12(b)(6). However, since petitioners ask this Court to take judicial notice of the Statement, we simply wish to point out that it supports our legal argument that there is a rational basis for the determination in question.

As the Mayor's April, 1983 statement makes clear, further reductions in Fire Department manning were no longer necessary as a result of an improved fiscal situation. Nowhere in the Mayor's statement is there any indication that there was sufficient funds to increase the number of firefighters on all City firetrucks to five. Indeed, quite the contrary seems apparent from the Mayor's statement that one of the reasons why further reductions were unnecesary is that "the Fire Department ... has taken significant strides to reduce its expenditures for overtime - it was the overtime expenditure necessitated by five-man manning that was a principal reason for my original proposal." (49a). Thus, it is quite clear that the determination of how many firefighters will man City firetrucks is financial in nature, and constitutes a decision as to how scarce resources should be allocated.

Petitioners' complaint amounts to no more than a claim that the classifications made by respondents resulting in their fire districts being

protected by four-man firetrucks, are classifications which are not made with "mathematical nicety [and] in practice ... result in some inequality." Dandridge v. Williams, 397 US 471, 485 (1970), quoting, Lindsley v. Natural Carbonic Gas Co., 220 US 61, 78 (1911). The courts have repeatedly held that with respect to claims of inadequate municipal services, or services which are not distributed in an equal manner, that the "Constitution does not require that laws treat every individual alike [in order] to withstand constitutional attack ... and a government body may draw lines or make decisions which treat individuals or entities differently. [Indeed], [t]he Constitution does not explicitly provide a right to municipal services." Mlikotin v. City of Los Angeles, 643 F 2d 652, 653 (9th Cir., 1981) (citations omitted). See also Dandridge v. Williams, 397 US 471, 485 (1970) ("The problems of government are practical ones and may justify, if they do not require, rough accommodatoins - illogical, it may be, and unscientific").

Thus, in reviewing determinations such as the one in issue here, where administrative or legislative officers are forced to draw lines on how far municipal services will extend and how many tax dollars will be allocated for those services, the courts are reluctant to interfere in those decisions. In San Antonio School District v. Rodriguez, 411 US 1, 40-41 (1973), this Court noted its reluctance.

> "This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause:
> 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized .... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies .... It has ... been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive

> discrimination against particular persons and classes ....' Madden v. Kentucky, 309 U.S. 83 87-88 (1940)."

Accordingly, in San Antonio, this Court held that the Texas system of financing public school education did not discriminate against its students on the basis of wealth, nor did it deny them a fundamental constitutional right to education.

Courts are even more reluctant to interfere with decisions concerning staffing of fire services (since it does not rise to as high a level of constitutional significance as education) and indeed, some courts have specifically found that inadequate fire and police services do not violate the Equal Protection Clause. Shortino v. Wheeler, 531 F 2d 938, 939 (8th Cir., 1976); Reiff v. City of Philadelphia 471 F Supp 1262 (E.D. Pa., 1979); see also Jackson v. City of Joliet, 715 F 2d 1200 (7th Cir., 1983); Local 736 v. City of Williamsport, 470 F Supp 344 (M.D. Pa.), aff'd, 601 F 2d 575 (3rd Cir.), cert. den. 444 US 932 (1979) and Reedy v. Mullins, 456 F Supp 955 (W.D. Pa., 1978) (where courts

rejected the claim that plaintiffs were deprived of adequate fire protection in violation of Due Process Clause of the Fourteenth Amendment). Similarly, courts have rejected challenges to municipal services in general, as well as challenges to municipal services in hospitals and in parks. Mlikotin v. City of Los Angeles, 643 F 2d 652 (9th Cir., 1981); Jackson v. New York City Health and Hospitals Corporation, 419 F Supp 809 (S.D. N.Y., 1979); Beal v. Lindsay, 468 F 2d 287 (2d Cir., 1972). Quite simply, since respondents' decision to staff certain engine companies with four firefighters is not based upon suspect classifications and is grounded in, inter alia, fiscal concerns, petitioners have not and cannot state a claim of denial of Equal Protection under the Fourteenth Amendment.

2. Petitioners have not been denied procedural or substantive due process by the reductions in Fire Department staffing.

In order to establish a property interest in adequate fire protection which would be shielded by the Due Process Clause of the Fourteenth

Amendment, petitioners must be able to demonstrate "more than an abstract need or desire for it. [They] must have more than a unilateral expectation of it. [They] must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 US 564, 577 (1972). Furthermore, petitioners must be able to prove that their legitimate claim of entitlement (1) is "grounded in and defined by some independent source of authority" [Wooters v. Jornlin, 477 F Supp 1140, 1144 (D. Del.), aff'd, 622 F 2d 580 (3d Cir., 1979), cert. den., 449 US 992 (1980)]; (2) is not "terminable 'at will' by governmental authorities" [Local 736 v. City of Williamsport, 470 F Supp 344, supra at 347]; and (3) is based upon a duty of the municipal officers to provide adequate fire services, and that that duty is owed to them as individuals "rather than to the public at large" [Wooters v. Jornlin, 477 F Supp 1140, supra at 1144.

To support their claim that they have a constitutionally protected property interest in having firetrucks staffed with five firefighters,

petitioners make the following arguments. They argue that their claim of entitlement is grounded in the following state laws: (1) McKinney's New York General City Law §20 (12) -which gives cities the power "to prevent and extinguish fires and to protect the inhabitants of the city and property within the city from loss or damage by fire or other casualty"; and (2) New York City Charter §487 which gives the defendant Fire Department the "sole and exclusive power and authority to extinguish fires at any place within the jurisdiction of the city...." Petitioners then argue that since the language of the General City Law §20 provides cities with the power to protect their inhabitants from fires, adequate fire protection is a duty which is owed to them as individuals and not to the public at large. Petitioners are clearly mistaken in their belief that fire protection is owed to them as individuals and not to the public at large.

It cannot be gainsaid that in determining whether a property interest under the Due Process Clause exists, the federal courts should look to state

decisional law to measure the scope of the interest in question. New York State decisions are clear that the municipal duty to provide services such as fire protection does not inure to the benefit of individual members of the public. For example, the New York State Court of Appeals recently held that New York City could not be found liable for its building inspector's failure to discover a leak in a gas system which ultimately caused an explosion. In holding that the cited provisions of the building code did not create a municipal duty to exercise care for the benefit of a particular class of individuals, as opposed to the public at large, the State Court of Appeals relied upon a long history of precedent which had never gone so far "as to hold that a general liability exists to the public for civil damage in event of failure to supply adequate police or fire protection." O'Connor v. City of New York, 58 NY 2d 184, 190 (1983), citing, Motyka v. City of Amsterdam, 15 NY 2d 134 (1965); see also Weiner v. Metropolitan Transportation Authority, 55 NY 2d 175 (1982) (the Transit Authority's allocation of

police resources is a legislative-executive decision for which there is no liability); Sanchez v. Village of Liberty, 42 NY 2d 876 (1977) (no liability may be imposed on a municipality for failure to enforce fire safety regulations). Thus, petitioners' reliance upon the term "inhabitants" in the General City Law as giving them an individual claim of entitlement is clearly misplaced. New York State and City laws simply do not create an individual claim of entitlement to adequate fire protection.

Furthermore, the law in New York State allows the level of staffing of municipal services to be changed at the will of the governmental authorities responsible for those services. Repeated challenges to the level of staffing in all phases of governmental service have been rejected by the New York courts,* since it is "undoubtedly within

*See, for example: Vizzini v. Beame, NYLJ, 12/16/74, p. 2, col. 2. (Sup. Ct., N.Y. Co., Baer, J.), aff'd, 47 AD 2d 602 (1st Dept., 1975) (closing of firehouses was upheld since "it is not the function

(footnote cont'd on next page)

the proper province of the municipality to determine how limited resources are best utilized. In meeting their responsibilities to the City's inhabitants municipal executives may allocate manpower and resources in such fashion as their best judgment indicates." Towns v. Beame, 386 F Supp 470, 474 (S.D.N.Y., 1974). Thus, in refusing to enjoin several New York City officials from closing eight fire companies in New York City, Judge Cannella in Towns v. Beame held that it was not the proper function of the Court to "secondguess or evaluate the wisdom of such determinations by the City." Id.

New York City Administrative Code §1173-4.3 also provides that employees can be removed from

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* (footnote cont'd from previous page)

of the courts to assume supervision over the operations [of] municipal government."); Steele v. Board of Education, 40 NY 2d 456 (1976) (abolition of guidance counselor positions, necessitated by the fiscal crisis, was upheld); Blyn v. Bartlett, 39 NY 2d 349 (1976) (abolition of, inter alia, law secretary positions, due to fiscal crisis, was upheld).

service for economic reasons. See DeLury v. City of New York, 51 AD 2d 288 (1st Dept., 1976) (where City layoff of sanitation workers during fiscal crisis was upheld despite contract which extended beyond layoff date). Thus, contrary to petitioners' argument, inhabitants of New York do not have a constitutionally protected property interest in having their engine companies manned with five firefighters. The Fourteenth Amendment does not require that petitioners be afforded an opportunity for a hearing prior to effecting a reduction in the staffing of New York City firetrucks.

Nor does a reduction in staffing constitute an infringement on a "fundmanetal constitutional right." Jackson v. City of Joliet, 715 F 2d 1200, 1204 (7th Cir., 1983) ("[T]he concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise"). The types of intrusion on personal security the Fourteenth Amendment is molded to protect are substantive aspects of life, liberty, and property. "Here, however, there is no claim that the

interest entitled to protection as a matter of substantive due process was anything resembling 'the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life'." Harrah Independent School District v. Martin, 440 US 194, 198 (1979), quoting, Kelley v. Johnson, 425 US 238, 244 (1976); see also Roe v. Wade, 410 US 113 (1973). Nor does petitioners' claim amount to conduct which "shocks the conscience" in violation of the Due Process Clause. Rochin v. California, 342 US 165, 172 (1952); see also White v. Rochford, 592 F 2d 381, 385 (7th Cir., 1979). Very simply, petitioners' claim is no more than a disagreement with the discretionary action taken by governmental authorities in allocating scarce resources.

In Kelley v. Johnson, 425 US 238 (1976), the plaintiff officers objected to the Suffolk County Police Department regulations limiting the length of its policemen's hair. In analyzing whether plaintiffs had a "liberty interest" within the Fourteenth Amendment in the freedom of choice with respect

to matters of personal appearance, this Court stated (425 US at 247-248):

> The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose. Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Prince v. Massachusetts, 321 U.S. 158, 168-170 (1944); Olsen v. Nebraska, 313 U.S. 236, 246-247 (1941). Having recognized in other contexts the wide latitude accorded the government in the "dispatch of its own internal affairs," Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961), we think Suffolk County's police regulations involved here are entitled to similar weight. Thus the question is not, as the Court of Appeals conceived it to be, whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it

> is on the county's method of organizing its police force, and the promotion of safety of persons and property. United Public Workers v. Mitchell, 330 U.S. 75, 100-101 (1947); Jacobson v. Massachusetts, 197 U.S. 11, 30-31, 35-37 (1905).
>
> We think the answer here is so clear that the District Court was quite right in the first instance to have dismissed respondent's complaint. Neither this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian service. The constitutional issue to be decided by these courts is whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded "arbitrary," and therefore a deprivation of respondent's "liberty" interest in freedom to choose his own hairstyle. Williamson v. Lee Optical Co., 348 U.S. 483, 487-488 (1955) (Emphasis supplied).

Since this Court found that the regulation was not arbitrary, it held that no right guaranteed by the Fourteenth Amendment had been violated, and upheld dismissal of the complaint.

The analysis applied in Kelley should be applied here. The issue of how many firefighters

should man an engine company is unquestionably "within the cognizance of the [City's] police power" and should be accorded a "presumption of ... validity." Id. at 247. Since the determination in question involves allocation of "available public funds in such a way as fully to meet the needs of the largest possible number of [inhabitants]" Dandridge v. Williams, 397 US 471, 485 (1970), it cannot be considered arbitrary. Thus, petitioners have not and cannot set forth any rights guaranteed by the Fourteenth Amendment which are being violated by the present staffing levels on City firetrucks. Dismissal of their complaint by the District Court was proper.

B. THE MOTION TO DISMISS WAS NOT CONVERTED TO A MOTION FOR SUMMARY JUDGMENT.

Petitioners argue at length that by granting the motion to dismiss the complaint, the District Court departed from the usual course of judicial proceedings on the ground that the dismissal motion was converted into a summary judgment motion. The premise of petitioners' argument is that in

granting respondents' application, the District Court relied upon respondents' counsel's affidavit filed in support of the motion. Petitioners' premise is incorrect.

Although the District Court did not affirmatively reject respondents' counsel's affidavit, there is absolutely nothing to indicate in either opinion below that, in fact, the affidavit was relied upon (1a-6a); thus, "it can be presumed that the district court did not use the affidavit in arriving at its decision to dismiss. The district court must have impliedly excluded the affidavit since it characterized its decision as a motion to dismiss for failure to state a claim rather than as a motion for summary judgment." AMFAC Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F 2d 426, 430 fn. 3 (9th Cir., 1978).

Even if the District Court read the affidavit in support of the motion, "the affidavit contains little of substance, and nothing which was needed by this court or impliedly by the district court to arrive at a decision." Id. It is submitted that the dismissal can

be sustained without regard to matters contained in the affidavit. See Gordon v. National Youth Work Alliance, 675 F 2d 356, 361 (D.C. Cir., 1982). The affidavit did not make any extraneous factual statements relied upon by the District Court in dismissing the complaint, and, at most, it posited conceivable rational bases, including fiscal considerations, upon which the staffing determination might have rested. (45a-48a). Since the court need go no further than the face of petitioners' complaint to find the same rational basis for the determination in question, it is clear that dismissal of the complaint, prior to discovery, was in all respects proper. See Scheuer v. Rhodes, 416 US 232, 235 fn. 3 (1974) (where, in setting forth the standard to be applied on a motion to dismiss, this Court noted that affidavits which made "no substantial contribution" to the questions in issue were disregarded). There is simply no basis for concluding that this matter was treated as a summary judgment application.

Finally, it is submitted that this Court's statement in Kelley v. Johnson, 425 U 238, 248 (1976), that dismissal of the complaint by the District Court in that action was proper, is instructive that claims involving purely discretionary issues within the State's police power are appropriate ones to be dismissed at the pleading stage. Moreover, even if dismisal in this instance were improper, the simple procedural issue petitioners raise does not merit review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

November 2, 1983

Respectfully submitted,

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